No. 79-1423

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,

Appellant,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL
SECOND APPELLATE DISTRICT,
STATE OF CALIFORNIA

BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT, SUBMITTED ON BEHALF OF THE LIFE INSURANCE COUNCIL OF NEW YORK

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BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT, SUBMITTED ON BEHALF OF THE LIFE INSURANCE COUNCIL OF NEW YORK

Preliminary Statement

Pursuant to Rule 36.2 of the Rules of this Court, this *amicus curiae* brief in support of appellant is filed with the written consent of appellant and appellee, on file with the Clerk of this Court.

Interest of *Amicus Curiae*

The Life Insurance Council of New York [LICONY] is an association of life insurance companies formed under the Not-For-Profit Corporation Law of New York. The membership of LICONY is made up of 53 life insurance companies, each of which is organized and doing business under the laws of the State of New York. Approximately 99% of the legal reserve life insurance in force in New York and sold by New York domestic companies is accounted for by members of LICONY. These companies also account for approximately 20% of life insurance premiums in the United States. By virtue of their domicile in New York, these companies are subjected to retaliatory tax burdens imposed by other States in which they have established businesses under licenses granted by the States.[1] This brief is devoted solely to the retaliatory tax issue in the case.

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[1] New York imposes on both domestic and out-of-State life insurance companies a premiums tax of 1% and, usually, an income tax of 9% on net income allocated to New York, subject to an overall 2.6% of taxable premiums limitation. N.Y. Tax Law §§ 1501, McKinney 1975, 1502, 1505(a), 1510(b), McKinney Cum. Supp., 1980. Prior to 1974, New York taxed life insurance companies solely on the basis of premiums. 1973 N.Y. Laws Ch. 861, § 1 amending N.Y. Tax Law § 187(2)(b), (c); 1974 N.Y. Laws Ch. 649, §§ 2, 3, 13(c) amending N.Y. Tax Law § 187 and repealing it, as amended, effective January 1, 1974. Between 1968 and 1974, the State imposed differentially higher taxes on domestic companies than it did on out-of-State companies. *Id.* This discrimination by New York against domestic companies was initiated because of expanding revenue requirements and the potentially adverse impact on domestic companies which would have resulted from retaliation by other States if the New York tax rates applicable to out-of-State companies had been increased. State of New York Annual Budget Message, 1975-76, pp. A22-A24. New York domestic companies were forced to pay additional taxes to New York so as to forestall the imposition of rate increases on out-of-State companies, which would have triggered retaliation in the form of higher tax pay-

Summary of Argument

Out-of-State insurers which have established businesses in a State under indefinite licenses were held under the pre-McCarran Act decisions to be protected by the Equal Protection Clause of the Fourteenth Amendment. The imposition by a State of more onerous tax burdens on such out-of-State insurers than on the State's own domestic corporations for the privilege of conducting an insurance business in the State was held to constitute a denial of Equal Protection of the Laws. The appellant, having established its insurance business many years ago under what the California courts have held constitutes an unequivocal license to do business in the State, could not have been subjected, under the pre-McCarran Act cases, to more onerous taxes than those imposed on California domestic insurance companies.

The California retaliatory tax does in fact impose on the appellant more onerous taxes than those levied on domestic insurers. The appellee's categorization of the California tax as a "reciprocal" tax is inappropriate. We are accustomed to allowances by many States of exemptions for gifts to out-of-State charities and deductions and credits to nonresidents, provided the State in which the charity operates or the nonresident's home State reciprocates by making

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ments to other States by New York companies. 1973 N.Y. Laws, Ch. 861, § 1 amending N.Y. Tax Law § 187(12)(a),(b).

In 1974, New York equalized the tax rates for out-of-State and domestic companies and added the net income tax to the existing premiums tax structure. 1974 N.Y. Laws Ch. 649, §§ 1, 13(a) enacting N.Y. Tax Law §§ 1501, 1502, 1510, effective January 1, 1974. In order to provide some relief for New York companies from the retaliatory taxes that they could expect from the new New York tax structure, including the equalization of out-of-State and domestic company tax rates, New York provided a credit to domestic companies for 90% of retaliatory taxes they might be required to pay to other States. N.Y. Tax Law § 1511(c), McKinney 1975.

similar allowances to charities or residents of the taxing State. The crucial difference between such reciprocal taxes and the California retaliatory tax is that they grant benefits to out-of-State taxpayers which the States are not required to grant as a constitutional matter, with or without reciprocity, whereas the California retaliatory tax imposes a burden or penalty on out-of-Staters that it clearly could not impose in the absence of the purported reciprocal feature, because the California tax discriminates against out-of-State insurers.

The McCarran Act does not validate the California retaliatory tax. There is nothing in the legislative history of the act to indicate that Congress intended to authorize discriminatory taxation of out-of-State insurers engaged in interstate commerce. It has been contended by the appellee that this Court held in *Prudential Insurance Company* v. *Benjamin* (328 U.S. 408 [1946]) that, by adopting the act, Congress lifted the Commerce Clause barriers to discriminatory taxation of out-of-State insurers holding indefinite licenses to conduct business in the State. The Solicitor General disagrees with that reading of the case.

In any event, it is clear that neither *Prudential Insurance Company* v. *Benjamin* nor any other decision of this Court has passed on the question as to whether Congress also sought by enacting the McCarran Act to lift Equal Protection Clause restrictions on the power of the States to discriminate against out-of-State insurers. The McCarran Act is directed solely to the Commerce Clause. There is no suggestion anywhere in the legislative history or the language of the act that it was directed to any of the restrictions imposed by the Equal Protection Clause on State taxation of out-of-State insurers. Instead, this Court has held to the contrary. (*State Board of Insurance* v. *Todd Shipyards*, 370 U.S. 451, 457 [1962]).

The McCarran Act should not be read as sanctioning the California retaliatory tax on out-of-State insurers for the further reason that such retaliatory taxation cannot be accommodated to our federalist structure. The premise underlying the appellee's entire argument is that retaliatory taxation constitutes a laudable fiscal policy, in that it tends to "achieve uniformity of treatment and not to discriminate." That contention is not borne out by the many decades of experience with retaliatory taxation of out-of-State insurers. Studies by economists, the conclusions of the National Association of Insurance Commissioners, the findings of State tax policy committees, and the views of other observers point to the conclusion that retaliatory insurance taxation does not promote uniformity, that it interferes with business across State lines, and that it should be abolished. The complications, difficulties and inconsistencies encountered in complying with retaliatory taxes and in their administration emphasize the arbitrariness and unfairness of the retaliatory tax structure. Such a system cannot be accommodated to the Equal Protection Clause of the Fourteenth Amendment in its role as an instrument of federalism.

ARGUMENT

I.

Under the pre-McCarran Act Decisions, the California Retaliatory Tax Violates the Equal Protection Clause Because It Imposes More Onerous Taxation on Out-of-State Insurers That Have Established Businesses in the State Under Indefinite Licenses Than Is Imposed on Domestic Insurers.

A. *Out-of-State Insurers That Have Established Businesses in a State Under an Indefinite License Are Entitled to the Protection of the Equal Protection Clause Against Discriminatory Taxation.*

The cases decided by this Court hold that a foreign insurance company that has established an insurance business in a State under an indefinite license granted by the State is a "person within" the "jurisdiction" of the State and is, accordingly, protected by the Equal Protection Clause of the Fourteenth Amendment. (*Hanover Fire Insurance Co.* v. *Harding,* 272 U.S. 494 [1926]); *see Lincoln Life Insurance Co.* v. *Read,* 325 U.S. 673, 676 [1945]). It is also established that to "tax the foreign corporation for carrying on business . . . by a different and more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws." (*Southern Railway Co.* v. *Greene,* 216 U.S. 400, 418 [1910]; *accord: WHYY, Inc.* v. *Borough of Glassboro,* 393 U.S. 117, 119 [1968]).

Out-of-State insurance companies which seek admission to a State for the first time, or which have been granted only annual renewable licenses to engage in business in the State have been held not to qualify for the protection of the Equal Protection Clause, because they have not yet be-

come a "person within its [the State's] jurisdiction". (*Philadelphia Fire Ass'n.* v. *New York,* 119 U.S. 110 [1886]; *Lincoln Life Insurance Co.* v. *Read, supra*).[2] The indefinite nature of the license to do business granted under the California statute to out-of-State insurers, including the appellant, which have thereupon established businesses in the State, brings the instant tax within the decisions invalidating discriminatory taxes.[3]

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[2] The instant case does not require the Court to consider the validity of this doctrine, since the appellant established its business in California under an indefinite license. The Life Insurance Council of New York, however, is prepared to contend in an appropriate case that this highly restrictive Nineteenth Century view of the Equal Protection Clause, like *Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168 (1868) is no longer an appropriate interpretation in the late Twentieth Century, and that the Equal Protection Clause should be held generally to apply to foreign corporations seeking admission to do business in a State and to those that hold either indefinite or annual renewable licenses to do such business.

[3] The appellee was in error in contending in its reply brief to the brief *amicus* of the United States on the motion to dismiss this appeal that the appellant's California license was not "indefinite" (pp. 4-5). This matter was considered by the California Court of Appeals in *Atlantic Insurance Co.* v. *State Board of Equalization,* 255 Cal. App.2d 1, 62 Cal. Reptr. 784 (1st Dist. 1967), in which the court said:

> In the present case appellants point out that California, unlike most states, grants certificates of authority to transact insurance business for an indefinite period, subject to payment of a $10 annual fee. (Ins. Code, §701, §705 as amended by stats. 1963, ch. 1917, §1.) A certificate is not granted until the applicant conforms to requirements of California law prerequisite to its issue. After such issue the insurer must continue to comply with requirements of law. (Ins. Code, §700.)
>
> Unlike insurers who must obtain an annual license to conduct business, appellants appear to have obtained "unequivocal" licenses to do business. The fact that the California certificates of authority could be revoked for failure to pay taxes or to otherwise comply with the law (Ins. Code, §701) does not alter that position. *Hanover Fire Ins. Co.* v. *Harding, supra,* 272 U.S. 494, is said to stand for the proposition that once a foreign corporation has been unconditionally admitted

B. *The California Retaliatory Tax Imposes a More Onerous Burden on Out-of-State Insurers Than Is Levied on Domestic Insurers and, Accordingly, Is Repugnant to the Equal Protection Clause.*

The court below held that the tax at issue did not violate the Equal Protection Clause, because it did not discriminate against foreign insurers (J.S. p. 33A). In so doing, the court followed an earlier California case, in which it had been stated:

> A franchise tax dependent on a foreign-domestic distinction alone is not a reasonable classification where both classes of corporation carry on essentially the same type of business. (*Southern Ry. Co.* v. *Greene* (1910) 216 U.S. 400, 417-418.) But here the purpose of the retaliatory law is to secure reciprocity. (*Bankers Life Co.* v. *Richardson, supra,* 192 Cal. 113, 124.) It is designed to achieve uniformity of treatment and not to discriminate. In view of the relative uniformity of insurance taxation in the several states, the California law seems reasonably designed to accomplish its purpose. Therefore we hold that for purposes of this tax foreign insurers are classified separately on a rational basis and that there was no denial of equal protection. [*Atlantic Insurance Co.* v. *State Board of Equalization,* 255 Cal. App. 2d 1, 15, 62 Cal. Reptr. 784, 793 (1967)].

We submit that this is error. The retaliatory increase of the appellant's California tax which is imposed generally at 2.35% of California premiums, to 2.5%, while California incorporated insurers paid a premiums tax of generally

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to do business in a state it must be granted equal protection. (272 U.S. at p. 514.) [255 Cal. App.2d at 13-14, 62 Cal. Reptr. at 792].

only 2.35%, is not validated by the fact that the increased tax was imposed by California because Ohio imposed on out-of-State insurers a premiums tax at the rate of 2.5%. (*See Western & Southern Life Ins. Co.* v. *State Board of Equalization,* 4 Cal. App. 3d 21, 25, 84 Cal. Rptr. 88, 91 [2d Dist. Ct. App. 1970]).

First, the California tax on Ohio insurers has all the components that this Court has always found offensive to the Equal Protection Clause, namely, a foreign corporation is subjected to more onerous tax burdens for the privilege of doing business in the State than domestic corporations engaged in the same business. Second, this Court recognized in *Wheeling Steel Corp.* v. *Glander* (337 U.S. 562 [1949]) that a reciprocity provision will not transform a tax that is otherwise discriminatory into a valid levy. In that case, an Ohio statute exempted from taxation certain accounts receivable owned by residents of the State, but taxed the receivables owned by nonresidents. The State contended that the tax was not discriminatory because it was part of the State's reciprocal statutory structure in taxing accounts receivable. This Court rejected that contention, saying:

> It is clear that this plan of "reciprocity" is not one which by credits or otherwise protects the . . . foreign corporation against the discriminations apparent in the Ohio statute. We think these discriminations deny appellants equal protection of Ohio law. [337 U.S. at 574].

The same is true of the California statute, since the retaliatory increase of appellant's California tax to the level of Ohio taxation of out-of-State insurance companies in no way protects appellant from being discriminated against

under the California tax vis-à-vis that State's domestic insurers.

As stated by Mr. Justice Brennan in a later case, the "Equal Protection Clause . . . [has as] its role to protect our federalism by denying . . . [a State] the power constitutionally to discriminate in favor of its own residents against the residents of other state members of our federation." (*Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522, 533 [1959]). That is the fatal defect in the California tax, notwithstanding its purported "reciprocity", since its effect is to discriminate in favor of California insurers against out-of-State insurers.

C. *The California Retaliatory Tax Does Not Find Support in the Reciprocal Deductions, Exemptions and Credits Granted to Foreign Charities and Nonresidents Under State Death and Personal Income Tax Laws, Because Such Provisions Would Be Constitutional Without Allowances to Out-of-Staters.*

There are in force over the country provisions of State death and income tax statutes that grant out-of-State charities and nonresident individuals certain exemptions, deductions and credits that are allowed in-State charities and residents, but only if similar allowances are granted to charities and residents of the taxing State by the taxpayer's home State. But there is a crucial difference between such reciprocity provisions and the retaliatory tax here at issue. In State death taxation, for example, it is common practice to allow an exemption or deduction for gifts to charities organized and operating in other States, provided there is a reciprocal provision in the laws of the foreign charity's State allowing death tax exemption for similar gifts to charities of the taxing State. (1 P-H Inheritance & Transfer Tax Serv., ¶ 854). Such a reciprocal provision is constitutional only because neither the

Equal Protection Clause nor any other constitutional provision would prevent the State from denying the exemption or deduction altogether to out-of-State charities, even though the exemption or deduction is granted to in-State charities. (*Board of Education* v. *Illinois,* 203 U.S. 553 [1906]). Denial of exemption or deduction for gifts to out-of-State charities while granting them to in-State charities is a reasonable classification under the Equal Protection Clause, because the rationale back of deductions or exemptions for gifts to charities is that they relieve the State of costs and burdens of carrying on public functions it would otherwise engage in, and they perform other services benefiting the people of the State. (See Killough, "Exemptions to Educational, Philanthropic and Religious Organizations", Symposium on Tax Exemptions 23, Tax Policy League [1939]). Since out-of-State charities operating entirely outside the taxing State neither relieve the taxing State of any public functions nor perform any other services benefiting the people of the State, an exemption or deduction for gifts to such charities may be denied, even though there is an exemption for gifts to in-State charities.[4]

The same observation applies to the waiver by many States of death taxation of the estates of decedents who were domiciled in other States, but owned stocks in corporations organized under the laws of the taxing State. (*See* 1 P-H Inheritance & Transfer Tax Serv., ¶ 851). As

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[4] As stated by this Court in *WHYY, Inc.* v. *Borough of Glassboro,* 393 U.S. 117, 120 (1968):

> This is not a case in which the exemption was withheld by reason of the foreign corporation's failure or inability to benefit the State in the same measure as do domestic nonprofit corporations. Compare *Board of Education* v. *Illinois,* 203 U.S. 553.

a constitutional matter, the State has the power to tax such decedents on the transfer of such stocks at death. (*State Tax Comm'n.* v. *Aldrich*, 316 U.S. 174 [1942]). By waiving the tax on a reciprocal basis, the State is yielding a constitutional power it possesses.

There are other income tax deductions, exemptions and credits available to residents of a State that are granted to nonresidents only on a reciprocal basis. These are also to be distinguished from the California retaliatory tax. For example, some States exempt nonresidents from income taxes on wages, salaries and other personal service compensation, if the nonresident's home State grants a similar exemption from its income tax to residents of the taxing State. (Ky. Rev. Stat. § 141.070(2) [Cum. Supp. 1980], CCH Ky. State & Local Tax Serv. ¶10-707; Md. Ann. Code, art. 81, §291(b) [1975], CCH Md. State & Local Tax Serv. ¶10-207). Likewise, some States allow a nonresident a credit on account of income taxes paid to his home State on income derived from occupations, trades or businesses conducted, or property located, in the taxing State if the nonresident's home State grants a similar credit to residents of the taxing State. (Calif. Rev. & Tax Code §18002 [West 1970], Reg. §§17951-17954, P-H Calif. State & Local Tax Serv. ¶56,606-Q; W. Va. Code §11-21-40 [1974], CCH W. Va. State & Local Tax Serv. ¶15-330).

In the cases referred to, Kentucky and Maryland have the constitutional power to tax nonresidents on the income exempted from tax, regardless of whether there is a reciprocal exemption; and there is no constitutional mandate requiring California or West Virginia to grant nonresidents credits for taxes paid the home State on income derived from sources in California or West Virginia, with or without reciprocity. (*Shaffer* v. *Carter*, 252 U.S. 37

[1920]; *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U.S. 60 [1920]).

The California retaliatory tax on out-of-State insurers is of a very different order. If California were to impose a higher premiums tax on out-of-State insurers holding indefinite licenses to do business in the State than that levied on domestic insurers, without reference to the level of premium taxation imposed on California insurers by the home States of the taxpayers, the tax would be struck down under the Equal Protection Clause, and, as we contend, the Commerce Clause, as discriminatory. (*Southern Railway Co.* v. *Greene, supra; WHYY, Inc.* v. *Borough of Glassboro, supra*). Hence, the California tax cannot be analogized to the reciprocal death and income taxes discussed above, because those taxes would be valid without their reciprocal features, whereas a California tax, imposed at a higher rate on Ohio insurers than on domestic insurers, would clearly be invalid, without regard to the level of Ohio taxes. The essential difference is that in the absence of the so-called reciprocal feature, the California retaliatory tax would clearly run afoul of the Equal Protection Clause, whereas the exemptions, deductions or credits discussed above that are granted to out-of-State charities or nonresidents on a reciprocal basis could be denied altogether.

Indeed, the California retaliatory tax is not properly characterized, as is done by counsel for the appellee, as a "reciprocal" tax. The term "reciprocal," as customarily used in the tax field, refers to the grant of a special allowance to taxpayers of other States, on condition that the State of residence or domicile of the taxpayer grant a similar allowance to residents or domiciliaries of the taxing State. As stated in a study of retaliatory insurance taxes:

> Reciprocity denotes a relation between two states which exists when each accords to citizens of the other certain privileges, on condition that its citizens also enjoy similar privileges at the hands of the other state. It is the return of a favor for a favor. On the other hand, as we have seen, retaliation is a return of disfavor with disfavor. [Pelletier, "Insurance Retaliatory Laws," 39 Notre Dame Lawyer, 243, 245-246 (1964)].

In the final analysis, the constitutional flaw in the attempt to impose higher taxes on out-of-State insurers than on domestic insurers in cases in which the taxpayer's home State taxes all insurers at a higher level is that the out-of-State insurer is subjected to more onerous taxes by the taxing State than are its own domestic insurers. That constitutional defect is in no way curable by whatever may be the tax structure of the home State of the out-of-State insurer. For as this Court stated in invalidating New Hampshire's tax on commuters:

> Nor . . . can the constitutionality of one State's statutes affecting nonresidents depend upon the present configuration of the statutes of another State. [*Austin* v. *New Hampshire,* 420 U.S. 656, 668 (1975)].

II.

The McCarran Act Did Not Validate the California Retaliatory Tax, Which Cannot Be Accommodated to Our Federalist Structure.

A. *Neither the Language Nor the Legislative History of the McCarran Act Warrants an Interpretation of the Statute as Validating a Discriminatory Tax on an Out-of-State Insurer That Has Established Its Business in the State Under an Indefinite License.*

(1) Commerce Clause.

As a consequence of the decision in *United States* v. *South-Eastern Underwriters Ass'n.* (322 U.S. 533 [1944]), it was believed that the States could no longer debar out-of-State insurers from entering the State to do business, or impose discriminatory taxes on such insurers as a condition of the grant of a license to conduct such a business. Instead, out-of-State insurers engaging in a multi-state business in the State were now thought to be in the same constitutional posture as other foreign corporations seeking to conduct interstate businesses. (*See* the Congressional Committee Reports relating to the McCarran Act, p. 16, *infra*).

As the law then stood, no State tax could be imposed on a foreign corporation for the privilege of conducting an interstate business in the State. (*Cheney Brothers Co.* v. *Massachusetts,* 246 U.S. 147 [1918]).[5] Then came the Mc-

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[5] When the *Cheney Brothers* case and the so-called *Spector* doctrine (346 U.S. 602 [1941]) were overruled a number of years after the McCarran Act had been enacted (*Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 [1977]), the long established principle, nevertheless, remained unchanged that in the silence of Congress, no State may impose a tax on out-of-State businesses that "discriminate[s] against interstate commerce." (*Id.,* 430 U.S. at 279).

Carran Act, which the court below held validates California's retaliatory tax against out-of-State insurers. That conclusion, we submit, was in error. There is nothing explicit in either the language of the act or its legislative history that suggests that Congress intended to authorize discriminatory taxation of out-of-State insurers. (*See* App. A; Report of House Committee on the Judiciary, H.R. Rep. No. 143, 79th Cong., 1st Sess. 2-3 [1945]; S. Rep. No. 20, 79th Cong., 1st Sess. [1945]; 91 Cong. Rec. 478-88, 1085-94, 1396, 1442-44, 1477-89 [1945]). As the Solicitor General has contended, in the absence of an explicit mandate from Congress to the contrary, "There is no reason why the tax provisions should be construed to permit anti-competitive taxation that discriminates against out-of-state insurers." (Br. Amicus for United States on motion to dismiss, p. 15).

However, it is argued by the appellee that *Prudential Insurance Company* v. *Benjamin, supra,* holds that in enacting the McCarran Act, Congress lifted the Commerce Clause barriers to discriminatory taxation against out-of-State insurers. (*See* Reply Br. to Br. Amicus of United States on motion to dismiss, pp. 2-3). The Solicitor General (at pp. 15-16) appears to reject that reading of the case as applied to the Commerce Clause. In any event, there is no question that the case did not consider the question as to whether Congress also sought by enacting the McCarran Act to lift Equal Protection Clause restrictions on the power of the States to discriminate against out-of-State insurers.

(2) Equal Protection Clause.

The McCarran Act provides that "silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation" of the business of insurance.

(§1011, App. A). It also provides that the business of insurance "shall be subject to the laws of the several States which relate to the regulation or taxation of such business." (§1012, App. A). This is unmistakably Commerce Clause language, and it is clear that it is directed to the effect of the silence of Congress on the powers of the States to tax insurers under the Commerce Clause. (*See* P. Hartman, State Taxation of Interstate Commerce, 24 *et seq.* [1953]; Sholley, "The Negative Implications of the Commerce Clause", 3 U. of Chicago L. Rev. 556, 583-588 [1936]). Likewise, the legislative history of the McCarran Act makes clear that the legislation was directed to the Commerce Clause restrictions on the State taxing powers.[6] Nowhere in any of the Committee Reports, or in the discussion of the bill on the floor of Congress, is there any suggestion that Congress was being asked, or sought, to exercise its powers under the Fourteenth Amendment in adopting the McCarran Act. Indeed, the House Judiciary Committee said:

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case.* [H.R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945)].

The *South-Eastern Underwriters* case dealt solely with the Commerce Clause, not the Equal Protection Clause. Moreover, this Court has noted that:

> Congress, of course, does not have the final say as to what constitutes due process under the Fourteenth

[6] *See* p. 16 *supra.* The legislative history of the McCarran Act is summarized in the brief for the United States as *amicus curiae* on the motion to dismiss the instant case (pp. 11-15).

> Amendment. And while Congress has authority by §5 of that Amendment to enforce its provisions (Ex parte Virginia, 100 U.S. 339; Monroe v. Pape, 365 U.S. 167), the McCarran-Ferguson Act does not purport to do so. [*State Board of Insurance* v. *Todd Shipyards*, 370 U.S. 451, 457 (1962)].

Consequently, whatever may be the powers that Congress possesses to relieve the States of the limitations of the Equal Protection Clause, it is clear from the course of the McCarran Act through Congress that that body was not seeking to exercise any such power. Accordingly, as the appellee recognizes (Appellee's Br. on motion to dismiss, p. 9), the prior law remained unchanged by the adoption of the McCarran Act with respect to the restrictions imposed by the Equal Protection Clause on discriminatory taxation of out-of-State insurers.

(3) The Decisions Under the McCarran Act.

There has been no decision of this Court that holds or suggests that Congress, in enacting the McCarran Act, purported to relieve the States of the prohibition of the Equal Protection Clause against discriminatory taxation of out-of-State insurers. In *Prudential Insurance Company* v. *Benjamin, supra,* following the adoption of the McCarran Act, this Court upheld a South Carolina premiums tax on out-of-State insurers that was not levied on domestic companies. In that case, the company held only an annual license to do business, not an indefinite license, so that the Equal Protection Clause was regarded as inapplicable to the case. Consequently, that case has no bearing on the instant case, since the appellant established its business in California under an indefinite license to conduct the insurance business in the State. Unlike Prudential,

the appellant is therefore protected by the Equal Protection Clause.[7]

Prudential Insurance Company v. *Hobbs* (328 U.S. 822 [1946]) is likewise not in point here, because in that case the State court was "unable to find in the record evidence to support the view that the tax in question on foreign insurance companies is greater than that levied on the home insurance companies." (*In re Insurance Tax Cases,* 161 P.2d 726, 734 [Kan. 1945]; *see* Appellant's Br. in opposition to motion to dismiss, p. 4.)

B. *The California Retaliatory Tax on Out-of-State Insurers Cannot Be Accommodated to Our Federalist Structure.*

Underlying the entire argument of the appellee in this case is the premise that comparative retaliatory taxes reflect a laudable fiscal policy in that they tend to "achieve uniformity of treatment and not to discriminate." (Appellee's Br. on motion to dismiss, p. 10). The record of many decades of experience with State retaliatory taxation of out-of-State insurers is to the contrary.

A review of the structure of the taxation of life insurance companies by the States, as is done in Appendix B, demonstrates that there are marked variations in rates, tax bases and modes of taxation.

As is shown by Appendix B, the premiums tax (which is measured by gross receipts) is the major tax imposed by most States on insurers. Looking across the country, State by State, there are significant variations (before retalation) between the States in both the tax rate and

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[7] This case dealt only with the Commerce Clause, except to the extent that the taxpayer contended that if the McCarran Act should be construed as validating the tax at issue, the levy would violate the Due Process Clause of the Fifth Amendment; Article I, Section 8; Article I Section 1, as well as the Tenth Amendment (328 U.S. at 437, note 49). There was no contention made under the Fourteenth Amendment by Prudential in the *Benjamin* case.

the tax base, which provide a basis for widespread retaliation against out-of-State insurers. Thus, the Idaho tax of as much as 3% on life and health premiums of domestic insurers is 500% of the Nebraska tax of 0.6%. In the case of out-of-State insurers, the premiums tax on life and health premiums ranges from 1% in New York to 4% in Oklahoma, a 300% difference.

There are also significant variations in the base of the premiums tax. Eight States tax gross premiums, while the other 42 States reduce the gross premiums by policy or contract dividends in whole or in part. While 18 States tax annuity considerations, such receipts are exempted by 32 States.

There are numerous other variations among the States in taxing insurance companies, some of which are shown in Appendix B and others which are too numerous and varied there to be reflected. Thus, premium taxes are reduced in a number of States on account of the companies' investments in those States. In some States this provision is granted only to domestic corporations (e.g., Idaho), in other States only to foreign corporations (e.g., Oklahoma, Texas), and in still other States to both domestic and foreign insurers (e.g., New Mexico). By way of contrast, the laws of many States contain no reduction in rates by reason of investments in the States (e.g., California).

In some States premiums or annuity considerations from "qualified or exempt plans" (under the I.R.C.) are excluded from the tax base (e.g., Colorado, Kansas and New Jersey), whereas in other States such premiums or considerations are included in the tax base (e.g., California, Louisiana and New York).

In addition to premiums taxes there are a variety of other taxes imposed by the States. Some states impose a

tax based on net income (e.g., Minnesota, Florida, Illinois and New York) some of which allow a credit against the income tax for premium taxes (e.g., Minnesota). In other States that impose income taxes, the income tax is credited against the premiums tax (e.g., Nebraska), whereas in New York, for example, the income tax is in addition to the premiums tax without any credit.

There are significant variations in State retaliatory taxes. As summarized in the tables in Appendix C, most States utilize the "aggregate" method of comparison of the taxes, fees and other economic burdens on insurance companies by the various States involved. (*See* Pyle, "The Metamorphic Retaliatory Tax Law" (What Lies Ahead?)", 23 Ass'n of Life Insurance Counsel Proc. 857, 878 *et seq.* [1972]). This method requires a comparison of the taxes, fees and other economic burdens otherwise imposed on the taxpayer by State A (the taxing State) with the total burdens that would be imposed by State B (the taxpayer's State of domicile) on an insurer organized under the laws of State A, if it were doing business in State B to the same extent and in the same manner as the taxpayer conducts business in State A. The amount by which the State B aggregate exceeds the State A aggregate is the retaliatory tax owed by the taxpayer.

Some States use the "item-by-item" method of comparing taxes, which compares to specific taxes.[8] Not only does

[8] Thus, assume State A has a 2% premiums tax on out-of-State insurers, while New York imposes a 1% premiums tax and a 9% income tax. State A will first compare New York and State A's premiums taxes. Since the State A premiums tax exceeds the New York premiums tax, State A will impose no retaliatory tax on account of New York's premiums tax. State A, however, will then separately compare New York's income tax (9%) to its income tax (none). State A will then impose a retaliatory tax based on the full 9% income tax imposed by New York. This is so even though New York's tax burden measured in the aggregate may be less than State A's burden measured in the aggregate.

the item-by-item method complicate compliance but it may also lead to mutual retaliation. (*Id.* at 881 *et seq.*).

Retaliatory statutes are frequently applied regardless of whether an insurer from one State (State A) is doing business in the taxpayer's home State (State B).[9] Thus, when State A retaliates against an insurer from State B, it is necessary to compare the insurer's actual tax burdens in State A with the tax burdens of a hypothetical insurer from State A doing in State B the same volume and kind of business the taxpayer did in State A.

Moreover, retaliation is a one-way street. No State, including California, reduces the taxes of out-of-State insurers if their States of domicile provide lower taxes for out-of-State insurers than the taxing State. Cal. Ins. Code, §685 (West 1972).

These variations demonstrate how hollow is the claim that the retaliatory insurance tax structure has produced substantial uniformity of treatment of domestic and out-of-State insurers by the States.

A recent empirical study of the effects of retaliatory State taxation of insurance companies made by Dr. Jerry J. Bodily, a Department of Justice economist, is critical of the position taken by the appellee. The study found the following:

> The foregoing analysis shows that retaliatory provisions *have been of questionable value.* Though theoretically possible, they have not been the historical cause of low tax rates for the life insurers. *Neither have they helped promote uniformity of state premium*

[9] This is the case in California. At the present time there is no California life insurance company doing business in New York and hence no California life insurer is required to pay taxes in New York higher than the level of taxes in California. Nevertheless, New York companies are subject to retaliation by California.

> *rates.* However, there does exist a potential for retaliatory provisions to be used against the domestic insurers they were enacted to protect. It, therefore, seems in the best interests of both industry and state officials to examine seriously the effects of and need for these provisions. [Bodily, "The Effects of Retaliation On the State Taxation of Life Insurers," 44 J. of Risk & Insurance 21, 34 (1977); our emphasis.]

These conclusions come as no surprise, for as early as 1909 in a Kentucky case (involving the very appellant before this Court) the weaknesses and defects of the retaliatory system were denounced in eloquent and, indeed, Biblical terms:

> Retaliation rarely brings about the result aimed at. Its effect is usually to intensify the evil. It is strictly forbidden by Him who taught as one having authority and not as the scribes; and we are constrained to believe that the rule we have announced is more in keeping with the spirit of American institutions than the rule allowing taxes to be collected in one state, not for public necessity, but in retaliation for those collected in another State from foreign corporations doing business there. The state may exclude foreign corporations from doing business here if it sees fit, and it may impose such conditions as it sees fit to impose within the constitutional inhibitions. But the people of the state who desire insurance will not be benefited in the end by laws that drive foreign insurance companies from the state or cripple competition in the insurance business. [*Western & Southern Insurance Co.* v. *Commonwealth,* 133 Ky. 292, 117 S.W. 376, 378 (1909)].

Although the holding in the case quoted from was subsequently overruled (*Clay* v. *Dixie Fire Insurance Co.,* 168

Ky. 315, 181 S.W. 1123 [1916]), time has borne out the view that the retaliatory insurance tax system intensifies the "evil" purportedly sought to be dealt with. More than half a century later, the National Association of Insurance Commissioners adopted a resolution advocating elimination of discriminatory premium taxation, including retaliatory taxes, stating:

> Such laws embody a questionable public policy, and, moreover, establish a mechanism for tax suppression which is rapidly losing its effectiveness as against the contemporary revenue needs of the states. The result, certain to become more widespread in the future, is further unfairness in and further distortion of the premium tax system.
>
> . . .
>
> In summary, the task force finds the present system of premium taxation to be unfair and inappropriate to the contemporary insurance economy, and recommends, as a single and indivisible program, the elimination of premium tax discrimination between domestic and foreign companies, the elimination of premium tax discrimination among types of insurance organization or arrangement, and *the elimination of retaliatory premium taxes.* [Task Force Report, "Statement of Policy on Insurance Premium Taxation," unanimously adopted December 17, 1970, 1 Proc. Nat'l. Ass'n. of Insurance Comm'rs 69, 71 (1971); our emphasis.]

Other knowledgeable observers agree:

> In a fundamental sense, retaliatory clauses have the effect of damagingly curtailing efforts to place this levy in a meaningful position within a state's tax system. Furthermore, the states are virtually power-

> less to eliminate such content, since they have—through their individual actions—painted themselves into a corner. [Strickler, "The Mess in State Premium Taxation of Insurance Companies," Vol. 69, Nos. 9 and 10, Best's Rev. (Property/Casualty Ins. Ed.) 34 (1961), at p. 38, Part 1.]

Recently, a New Jersey Tax Policy Committee appointed by the Governor of that State, after studying retaliatory taxation of out-of-State insurers, found that "retaliatory taxes interfere with business across State lines," and recommended that:

> The system of discriminatory and retaliatory insurance taxes among the States should be abolished. . . . [Report of New Jersey Tax Policy Committee, Vol. V pp. 47, 50 (1972)].

The entire effort to compare one State's level of taxation with the level of taxation of another State is fraught with complication and uncertainty, and often results in arbitrary retaliation, not because it is justified under the statute, but because of difficulties of proof. We are not without experience with the "inequalities and hardships" that attempts to measure taxes of one State by the taxes of other States are likely to entail. (*See Salomon* v. *State Tax Comm'n.*, 278 U.S. 484, 491-492 [1929]). The Federal statutes for more than a century authorized the States to tax shares of stock of national banks, provided, *inter alia*, "the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks." (§5219 U.S. Rev. Stat., 12 U.S.C. §548). For the mass of litigation that has ensued over this provision, and the refinements, complications, obscurities and difficulties it has engendered, see S.E.

Leland, "The History and Impact of Section 5219 on the Taxation of National Banks," App. 6, in Report of Study Under P.L. 91-156, Board of Governors, Federal Reserve System, for the Senate Banking, Housing and Urban Affairs Committee [92nd Cong. 1st Sess. Dec. 1972]. These difficulties, complications and uncertainties in making the necessary tax comparisons emphasize the unacceptability under the Equal Protection Clause, of the retaliatory tax on insurers.

In summary as to the Equal Protection Clause, California here seeks to impose a higher tax on an out-of-State insurer for the privilege of doing business in the State than it imposes on its own domestic insurers for the privilege of conducting the same type of business. That such a levy cannot be accommodated to the Equal Protection of the Laws Clause of the Fourteenth Amendment and its role as an "instrument of federalism" is indicated by the opinion of Justice Brennan in *Allied Stores of Ohio, Inc.* v. *Bowers, supra,* in which he stated:

> The maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action. Because there are 49 States and much of the Nation's commercial activity is carried on by enterprises having contacts with more States than one, a common and continuing problem of constitutional interpretation has been that of adjusting the demands of individual States to regulate and tax these enterprises in light of the multistate nature of our federation. While the most ready examples of the Court's function in this field are furnished by the innumerable cases in which the Court has examined state taxation and regulation under the

> Commerce and Due Process Clauses, still the Equal Protection Clause, among its other roles, operates to maintain this principle of federalism. [358 U.S. at 532.]

Accordingly, it is submitted that the retaliatory tax here at issue, as applied to a corporation conducting business in California under an indefinite license to do business in the State, which would have been repugnant to the Equal Protection Clause before the adoption of the McCarran Act, remains repugnant to that Clause, as well as to the Commerce Clause, since the enactment of that Act; and that there is no basis for holding the retaliatory tax nondiscriminatory because of the asserted benefits of retaliatory taxation.

CONCLUSION

The judgment of the Court of Appeals of the State of California Second Appellate District should be reversed and the judgment of the Superior Court of California of the County of Los Angeles should be reinstated with respect to the retaliatory tax issue. (This brief is not directed to the principal office deduction issue).

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Respectfully submitted,

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APPENDIX

APPENDIX A

Statutes

15 U.S.C. §1011. *Declaration of policy*

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Mar. 9, 1945, c.20, §1, 59 Stat. 33.

15 U.S.C. §1012. *Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948*

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Mar. 9, 1945, c.20, §2, 59 Stat. 34; July 25, 1947, c.326, 61 Stat. 448.

APPENDIX B

State Taxation of Legal Reserve Life Insurance Companies*

State	Type of Company	Rate of Tax (%) L	H	A	Tax Base L	H	A	Income or Other General Tax	Retaliatory Statute
1. Alabama	domestic	1.0	1.0	1.0	–	–	a	–	–
	foreign	3.0	3.0	1.0	–	–	a	–	Yes b
2. Alaska	domestic	1.5	1.5	–	–	–	–	–	–
	foreign	3.0	3.0	–	–	–	–	–	Yes b
3. Arizona	domestic	1.0	1.0	–	–	–	–	–	–
	foreign	2.0	2.0	–	–	–	–	–	Yes b
4. Arkansas	domestic	–	–	–	–	–	–	Yes	–
	foreign	2.5	2.5	–	a	–	–	–	Yes b
5. California	domestic	2.35 c	2.35	2.35 c	–	–	–	–	–
	foreign	2.35 c	2.35	2.35 c	–	–	–	–	Yes b
6. Colorado	domestic	2.25	2.25	–	ac	a	–	–	–
	foreign	2.25	2.25	–	ac	a	–	–	Yes b
7. Connecticut	domestic	2.0	2.0	–	–	–	–	Yes	–
	foreign	2.0	2.0	–	–	–	–	–	Yes b
8. Delaware	domestic	2.0	2.0	–	–	–	–	–	–
	foreign	2.0	2.0	–	–	–	–	–	Yes b

* (1) The term "domestic" refers to a life insurance company organized under the laws of the State indicated, and "foreign" refers to a life insurance company organized under the laws of another State. (2) "L" refers to taxable life insurance premiums, "H" refers to taxable health and disability insurance premiums, and "A" refers to taxable annuity considerations. (3) Unless otherwise noted, the tax base is gross direct premiums (or considerations) received less policy (or contract) dividends and is indicated by a dash under the Tax Base column. (4) A dash under the "Rate of Tax" column means that no tax is imposed. (5) Column headed "Income or Other General Tax" generally refers to revenue or privilege taxes other than premiums taxes or *ad valorem* property taxes.

9. Florida	domestic	–	–	–	–	–	–	Yes	–
	foreign	2.0	2.0	1.0	a	a	a	Yes	Yes b
10. Georgia	domestic	2.25	2.25	1.5	–	–	–	–	–
	foreign	2.25	2.25	1.5	–	–	–	–	Yes b
11. Hawaii	domestic	1.918	2.9647	–	–	a	–	–	–
	foreign	3.197	4.2824	–	–	a	–	–	No d
12. Idaho	domestic	3.0	3.0	–	c	–	–	–	–
	foreign	3.0	3.0	–	c	–	–	–	Yes b
13. Illinois	domestic	–	–	–	–	–	–	Yes	–
	foreign	2.0	2.0	–	–	–	–	Yes	Yes b
14. Indiana	domestic	–	–	–	–	–	–	Yes	–
	foreign	2.0	2.0	–	–	–	–	–	Yes e
15. Iowa	domestic	2.0	2.0	2.0	c	–	c	–	–
	foreign	2.0	2.0	2.0	c	–	c	–	Yes b
16. Kansas	domestic	1.0	1.0	1.0	c	–	c	–	–
	foreign	2.0	2.0	2.0	c	–	c	–	Yes f
17. Kentucky	domestic	–	–	–	a	–	a	Yes	–
	foreign	2.0	2.0	2.0	a	–	a	–	Yes b
18. Louisiana	domestic	1.7	1.7	1.7	a	a	a	Yes	–
	foreign	1.7	1.7	1.7	a	a	a	Yes	Yes e
19. Maine	domestic	1.0	1.0	1.0	c	–	c	–	–
	foreign	2.0	2.0	2.0	c	–	c	–	Yes b
20. Maryland	domestic	2.0	2.0	–	–	–	–	–	–
	foreign	2.0	2.0	–	–	–	–	–	Yes b
21. Massachusetts	domestic	2.0	2.0	–	–	–	–	Yes	–
	foreign	2.0	2.0	–	–	–	–	–	Yes gh
22. Michigan	domestic	–	–	–	–	–	–	Yes	–
	foreign	2.0	2.0	–	a	–	–	–	Yes b

State	Type of Company	Rate of Tax (%) L	H	A	Tax Base L	H	A	Income or Other General Tax	Retaliatory Statute
23. Minnesota	domestic	2.0	2.0	–	–	–	–	Yes	–
	foreign	2.0	2.0	–	–	–	–	Yes	Yes g
24. Mississippi	domestic	1.5	1.5	1.0	c	–	c	Yes	–
	foreign	3.0 c	3.0	2.0	–	–	c	Yes	Yes b
25. Missouri	domestic	2.0	2.0	2.0	c	–	c	–	–
	foreign	2.0	2.0	2.0	c	–	c	–	Yes b
26. Montana	domestic	2.75	2.75	–	–	–	–	–	–
	foreign	2.75	2.75	–	–	–	–	–	Yes b
27. Nebraska	domestic	0.6	0.6	0.6	c	–	c	Yes	–
	foreign	2.0	2.0	2.0	c	–	c	Yes	Yes b
28. Nevada	domestic	2.0	2.0	2.0	c	–	c	–	–
	foreign	2.0	2.0	2.0	c	–	c	–	Yes b
29. New Hampshire	domestic	2.0	2.0	–	–	–	–	Yes	–
	foreign	2.0	2.0	–	–	–	–	Yes	Yes g
30. New Jersey	domestic	2.0	2.0	–	c	–	–	–	–
	foreign	2.0	2.0	–	c	–	–	–	Yes b
31. New Mexico	domestic	2.5	2.5	–	–	–	–	–	–
	foreign	2.5	2.5	–	–	–	–	–	No d
32. New York	domestic	1.0	1.0	–	–	–	–	Yes	–
	foreign	1.0	1.0	–	–	–	–	Yes	Yes fh
33. North Carolina	domestic	1.5	1.5	1.5	ac	a	ac	–	–
	foreign	2.5	2.5	2.5	ac	a	ac	–	No d
34. North Dakota	domestic	–	–	–	–	–	–	Yes	–
	foreign	2.5	2.5	–	–	–	–	–	Yes g
35. Ohio	domestic	–	–	–	–	–	–	Yes	–
	foreign	2.5	2.5	–	a	a	–	–	Yes f

36. Oklahoma	domestic	–	–	–	–	–	–	Yes	–
	foreign	4.0	4.0	–	–	–	–	–	Yes b
37. Oregon	domestic	–	–	–	–	–	–	Yes	–
	foreign	2.25	2.25	–	–	–	–	–	Yes b
38. Pennsylvania	domestic	2.0	2.0	–	–	–	–	–	–
	foreign	2.0	2.0	–	–	–	–	–	Yes b
39. Rhode Island	domestic	2.0	2.0	–	–	–	–	–	–
	foreign	2.0	2.0	–	–	–	–	–	Yes e
40. South Carolina	domestic	2.0	2.0	–	–	–	–	–	–
	foreign	3.0	3.0	–	–	–	–	–	Yes e
41. South Dakota	domestic	0.75	0.75	0.5	c	–	c	–	–
	foreign	2.5	2.5	1.25	c	–	c	–	Yes b
42. Tennessee	domestic	1.75	1.75	1.5	c	–	c	Yes	–
	foreign	2.0 c	2.0	1.5 c	c	–	c	Yes	Yes e
43. Texas	domestic	1.1	1.1	–	–	–	–	–	–
	foreign	3.3	3.3	–	–	–	–	–	Yes b
44. Utah	domestic	2.25	2.25	–	–	–	–	–	–
	foreign	2.25	2.25	–	–	–	–	–	Yes b
45. Vermont	domestic	2.0	2.0	–	–	–	–	–	–
	foreign	2.0	2.0	–	–	–	–	–	Yes e
46. Virginia	domestic	2.25	2.75	–	a	a	–	–	–
	foreign	2.25	2.75	–	a	a	–	–	Yes b
47. Washington	domestic	1.0	1.0	–	ac	a	–	–	–
	foreign	2.0	2.0	–	ac	a	–	–	Yes b
48. West Virginia	domestic	3.0	3.0	1.0	a	a	a	–	–
	foreign	3.0	3.0	1.0	a	a	a	–	Yes b
49. Wisconsin	domestic	–	–	–	–	–	–	Yes	–
	foreign	2.0	2.0	–	–	–	–	–	Yes e
50. Wyoming	domestic	1.5	1.5	1.0	c	–	c	–	–
	foreign	2.5	2.5	1.0	c	–	c	–	Yes b

Appendix B

Descriptive Footnotes

a No deduction is allowed for policy or contract dividends.

b Retaliatory statute, by its terms, requires that retaliatory taxes be computed by the "aggregate" method.

c Premiums or annuity considerations received from "qualified or exempt plans" are generally excluded from the tax base or are taxable at a different or lesser rate of tax.

d There is no generally applicable retaliatory statute.

e It is unclear whether retaliatory taxes are to be computed by the "aggregate" method or the "item-by-item" method.

f Case law requires that retaliatory taxes be computed by the "aggregate" method. *Employers Casualty Co.* v. *Hobbs,* 149 Kan. 774, 89 P.2d 923 (1939); *John Hancock Mut. Life Ins. Co.* v. *Pink,* 276 N.Y. 421, 12 N.E.2d 529 (1938); *Indemnity Ins. Co. of North America* v. *Stowell,* 172 Ohio 167, 174 N.E.2d 536 (1961).

g Retaliatory taxes are computed by the "item-by-item" method. Mass. Ann. Laws Ch. 63, § 21 (1978) (*cf. Firemen's Fund Ins. Co.* v. *Commissioner,* 325 Mass. 386, 90 N.E.2d 669 (1950)); Minn. Op. Att'y Gen. 254-d (April 12, 1941), 252-E (June 11, 1970); N.H. premium and retaliatory tax return blank providing that "New Hampshire retaliates on a 'Tax-for-Tax' and 'Fee-for-Fee' basis"; N.D. Op. Att'y Gen. (January 21, 1953), N.D. Ins. Dept. Letter (March 12, 1958).

h Reciprocal non-retaliation statute provides that the State's retaliatory statute will not be applied to companies domiciled in states having either no retaliatory statute or a similar reciprocal non-retaliation provision.

APPENDIX C

Summary of Retaliatory Statutes

Table No. 1—States having retaliatory statutes which by their terms utilize the "aggregate" method.

Alabama
Alaska
Arizona
Arkansas
California
Colorado
Connecticut
Delaware
Florida
Georgia
Idaho
Illinois
Iowa
Kentucky
Maine
Maryland
Michigan
Mississippi
Missouri
Montana
Nebraska
Nevada
New Jersey
Oklahoma
Oregon
Pennsylvania
South Dakota
Texas
Utah
Virginia
Washington
West Virginia
Wyoming

Table No. 2—States having retaliatory statutes which by judicial construction have been held to require use of the "aggregate" method.

Kansas
New York
Ohio

Appendix C

Table No. 3—States having retaliatory statutes which have been administered by utilizing the "item-by-item" method.

Massachusetts
Minnesota
New Hampshire
North Dakota

Table No. 4—States having retaliatory statutes which are not clear as to whether they apply "item-by-item" or by use of the "aggregate" method.

Indiana
Louisiana
Rhode Island
South Carolina
Tennessee
Vermont
Wisconsin

Table No. 5—States having no generally applicable retaliatory statute.

Hawaii
New Mexico
North Carolina

Table No. 6—States having a reciprocal non-retaliation statute.

Massachusetts
New York

Statutory Basis for Appendix B and Appendix C

1. Ala. Code §§ 27-3-29, 27-4-1, -4, -5 (1975).
2. Alaska Stat. §§ 21.09.210(a)-(c), .270, .69.390(c) (1966).
3. Ariz. Rev. Stat. §§ 20-224A, -224B, -230 (Cum. Supp. 1980).
4. Ark. Stat. Ann. §§ 66-2225, -2302(1), (2), 84-2004, -2006(2) (1980).
5. Cal. Const. art. 13, § 28 (West Cum. Supp. 1980); Cal. Ins. Code §§ 685, 685.1, .2 (West 1972); Cal. Rev. & Tax Code §§ 12201 (West 1970), 12202 (West Cum. Supp. 1980), 12221 (West 1970), 12222 (West Cum. Supp. 1980).
6. Colo. Rev. Stat. § 10-3-209(1), (2) (1973 & Cum. Supp. 1978).
7. Conn. Gen. Stat. Ann. §§ 12-201 to -203, -210, -210a, -211, -214 (West Cum. Supp. 1980).
8. Del. Code tit. 18, §§ 531, 702(a)-(c), 707 (1974).
9. Fla. Stat. Ann. §§ 220.02, .11 (West Cum. Supp. 1980), 624.509 (West 1972 & West Cum. Supp. 1980), 624.512, .514 (West 1972).
10. Ga. Code Ann. §§ 56-321 (1977), 56-1303 (Cum. Supp. 1980), 56-1305 (1977).
11. Haw. Rev. Stat. §§ 431-317 (1976), 431-318 (Cum. Supp. 1980).
12. Idaho Code §§ 41-340 (1977), 41-402 (Cum. Supp. 1980), 41-403 (1977).
13. Illinois Income Tax Act §§ 201, 205 (Ill. Ann. Stat. ch. 120, §§ 2-201, -205 (Smith-Hurd Cum. Supp. 1980)); Illinois Insurance Code § 409 (Ill. Ann. Stat. ch. 73, § 1021 (Smith-Hurd Cum. Supp. 1980)).
14. Ind. Code Ann. §§ 6-2-1-1(a), -7(k) (Burns Cum. Supp. 1980), 27-1-18-2, -20-12 (Burns 1975).
15. Iowa Code Ann. §§ 432.1, 505.14 (West Cum. Supp. 1980).
16. Kan. Stat. §§ 40-252A, -252D (Cum. Supp. 1979), 40-253 (1973).

17. Ky. Rev. Stat. Ann. §§ 136.320, .330 (1977), 304.3-270 (1971).

18. La. Rev. Stat. §§ 22:1061, :1062, :1066, :1068, :1079 (1978), 47:221, :227 (1970).

19. Me. Rev. Stat. tit. 24A, § 428 (1964), tit. 36, §§ 2511, 2513-2515 (1964).

20. Md. Ann. Code art. 48A, § 61 (1979), art. 81, §§ 135, 136 (1975 & Cum. Supp. 1979), 136A (1975).

21. Mass. Ann. Laws ch. 63, §§ 20, 21, 22A, 22B, 24A (1978), ch. 175, § 159 (1977), Spec. L. ch. 11, §§ 3-7, 10, 11 (1979); Mass. Gen. Laws 1932 ch. 63, § 20 (as amended by ch. 509, 1941 Mass. Acts); 1943 Mass. Acts, ch. 531, §§ 2, 3 (as amended by ch. 558, 1960 Mass. Acts).

22. Mich. Comp. Laws §§ 208.3, .35(d), 500.440, .446 (Mich Stat. Ann. §§ 7.558(3), .558(35)(d) (Callaghan 1978), 24.1440 (Callaghan Cum. Supp. 1980), 24.1441, .1446 (Callaghan 1972)).

23. Minn. Stat. Ann. §§ 60A.15 subd. 1, .19 subd. 6 (West Cum. Supp. 1980), 290.06 subds. 1, 3a(5), (West Cum. Supp. 1980), 290.35 (1962).

24. Miss. Code Ann. §§ 27-7-5(1), (2) (1972), 27-15-103, -109, -119 (Cum. Supp. 1980), 27-15-123, -125, -127 (1972).

25. Mo. Ann. Stat. §§ 148.340, .370 (Vernon 1976), 148.390 (Vernon Cum. Supp. 1980), 375.916 (1968).

26. Mont. Code Ann. §§ 33-2-705, -709 (1979).

27. Neb. Rev. Stat. §§ 44-150 (1978), 77-907 (Cum. Supp. 1980), 77-908, -909, -2734 (1976).

28. Nev. Rev. Stat. §§ 680A.330, 680B.030, .050 (1979).

29. N.H. Rev. Stat. Ann. §§ 77-A:2, :5 (Cum. Supp. 1979), 400-A:32, :35 (Cum. Supp. 1979).

30. N.J. Stat. Ann. §§ 17B:23-5 (West Spec. Pam. 1980), 54:18A-1, -3, -5 (West Cum. Supp. 1980), 54:18A-6 (West 1960), 54:18A-13, -20 (West Cum. Supp. 1980).

31. N.M. Stat. Ann. § 59-5-1 (1978).

32. N.Y. Ins. Law § 61(1) (McKinney 1966), 61(4) (McKinney Cum. Supp. 1980); N.Y. Tax Law §§ 1501 (McKinney 1975), 1502, 1505 (McKinney Cum. Supp. 1980), 1510 (McKinney 1975 and McKinney Cum. Supp. 1980), 1511(b), (c) (McKinney 1975).

33. N.C. Gen. Stat. §§ 105-228.5, .8 (1979).

34. N.D. Cent. Code §§ 26-01-05 (1978), 26-01-11 (Cum. Supp. 1979), 57-38-09(15), -11 (1972).

35. Ohio Rev. Code Ann. §§ 3905.41 (Page 1971), 5725.18, .19, 5729.03, .04, .06 (Page 1980).

36. Okla. Stat. Ann. tit. 36, §§ 624 (West Cum. Supp. 1979), 625, 628 (West 1976), tit. 68, §§ 2355(C), 2359 (West Cum. Supp. 1979).

37. Or. Rev. Stat. §§ 317.070, .080(11), .197 (1979), 731.816, .854 (1979).

38. Pa. Stat. Ann. tit. 40, § 50 (Purdon Cum. Supp. 1980), tit. 72, §§ 7901, 7902 (Purdon Cum. Supp. 1980).

39. R.I. Gen. Laws §§ 27-2-17 (1979), 44-17-1, -2 (1970).

40. S.C. Code §§ 38-5-320, -330, -340, -350, -380, -410, -480 (1977).

41. S.D. Compiled Laws Ann. §§ 10-44-1 (1967), 10-44-2 (Cum. Supp. 1980), 10-44-4, -5 (1967), 58-6-70 (1978).

42. Tenn. Code Ann. §§ 56-4-201, -204, -205, -209, -217, -218 (1980), 67-2702, -2902 (1976).

43. Tex. Rev. Civ. Stat. Ann. arts. 4769 (Vernon 1963), 7064a (Vernon Cum. Supp. 1980); Tex. Ins. Code Ann. art. 3.34 (Vernon Spec. Pam. Supp. 1979).

44. Utah Code Ann. §§ 31-14-4, -9 (1974).

45. Vt. Stat. Ann. tit. 8, §§ 3367, 3718 (1970), tit. 32, §§ 8551, 8554, 8555 (1970).

46. Va. Code §§ 38.1-87 (1976), 58-486 (1974), 58-490 (Cum. Supp. 1980), 58-491 (1974).

47. Wash. Rev. Code Ann. §§ 48.14.020, .021 (Cum. Supp. 1980), 48.14.040 (1961).

48. W.Va. Code §§ 33-3-14 (Cum. Supp. 1980), 33-3-14a, -14b, -15, -16 (1975).

49. Wis. Stat. Ann. §§ 601.31(v) (West 1980), 76.62, .65 to .67, .69 (formerly §§ 76.31, .34 to .36, .375) (West 1957 and West Cum. Supp. 1980).

50. Wyo. Stat. §§ 26-3-133, -4-103, -4-104 (1977).